Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

No._____

STEFFAN E. CARROLL,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, SIXTH APPELLATE DISTRICT

# PETITION FOR WRIT OF CERTIORARI

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(I)

QUESTIONS PRESENTED

1. Does a prosecutor's statement that proof beyond a reasonable doubt does not require scientific certainty violate Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990) when an objection to such statement in closing argument is followed by the Court's assertion, uncorrected by any instructions, that "scientific certainty is not one of the elements," and is a defendant whose trial has been thus tainted entitled to automatic reversal under Sullivan v. Louisiana, ____U.S.____, 113 S.Ct. 2078 (1993)?

2. Does Penal Code section 262(b), which provides that "there shall be no arrest or prosecution under this section [for spousal rape] unless the violation of this section is reported . . . within 90 days after the day of the violation," contravene the Equal Protection Claus of the Fourteenth Amendment if it is restricted to cases of vaginal as

distinct from oral or anal forcible penetration of a spouse?

3. Is the erroneous introduction of evidence concerning a defendant's lifestyles, beliefs and social values properly reviewable under the harmless error standard in light of Dawson v. Delaware, ___U.S.___, 112 S.Ct. 1093 (1982), and was such evidence improperly introduced and commented upon in the present case?

[1] The parties to this case are Steffan E. Carroll, Petitioner herein, Defendant before the Superior Court of the State of California for the County of Santa Clara, Appellant before the Court of Appeal of the State of California of the Sixth Appellate District, and Petitioner before the Supreme Court of the State of California; and Respondent State of California, appearing below before the above-entitled courts as People of the State of California, Plaintiff before the trial court and Respondent before the Court of Appeal and the California Supreme Court.

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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

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No._____

STEFFAN E. CARROLL, Petitioner,

v.

STATE OF CALIFORNIA, Respondent.

_____

PETITION FOR WRIT OF CERTIORARI TO THE
COURT OF APPEAL OF THE STATE OF CALIFORNIA
SIXTH APPELLATE DISTRICT

_____

Petitioner STEFFAN E. CARROLL hereby petitions for a Writ of Certiorari to the Court of Appeal of the State of California, Sixth Appellate District.

## OPINIONS BELOW

The unreported opinion of the Court of Appeal of the State of California, Sixth Appellate District, affirming the judgment

of conviction against Petitioner and filed on June 14, 1993, is presented here as Appendix A. The unreported order of the Court of Appeal filed on July 6, 1993, denying Petitioner's timely Petition for Rehearing constitutes Appendix B. The unreported order filed on September 23, 1993, and rendered by the Supreme Court of the State of California denying Petitioner's timely Petition for Review is presented here as Appendix C.

## JURISDICTION

The opinion of the Court of Appeal affirming the judgment below was filed on June 14, 1993, and a timely Petition for Review was denied by the Supreme Court of the State of California by order filed on September 23, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. section 1257.

/ / /

## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED.

This case involves questions concerning the First, Fifth and Fourteenth Amendments to the United States Constitution and California Penal Code Section 262(b), pertinent provisions of which appear in Appendix D.

## STATEMENT OF THE CASE

Appellant was originally charged with bigamy, (California Penal Code, section 281), forcible sodomy, (section 286(c), forcible oral copulation, (288a(c)), false imprisonment (sections 236-237, and spousal battery, (section 273.5). The bigamy charge was dismissed prior to trial for lack of evidence. Defendant was acquitted of the sodomy charge and convicted on the remaining counts.

Facts will be added as the discussion proceeds.

## REASONS FOR GRANTING WRIT

I

1. Does a prosecutor's statement that proof beyond a reasonable doubt does not require scientific certainty constitute a violation of the rule enunciated by this Court in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (190), and does the resultant error mandate automatic reversal under Sullivan v. Louisiana, ____U.S.____, 113 S.Ct. 2078 (1993)?

This case presents several questions the answers to which are suggested by, but not specified within, the foregoing decisions. One is the question of whether, and under what circumstances, the Cage rule is implicated by prosecutorial comment which the court fails to cure notwithstanding timely objection. Both Cage and Sullivan involved instructional error. Here, the prosecutor remarked that proof beyond a reasonable doubt did not require proof to a

scientific certainty, only proof to a moral certainty. A timely objection by defense counsel was followed by the court's assertion, uncorrected by any instructions, that "scientific certainty is not one of the elements." The Court of Appeal did not address the Sullivan issue, although it was raised at argument within days of Sullivan's publication and in a timely Petition for Rehearing and although the prosecutor's comment was addressed in the briefs.

In Sullivan, the High Court automatically reversed a conviction obtained as a result of a reasonable doubt instruction that was substantially identical to the one found to be constitutionally defective in Cage v. Louisiana, 498 U.S. 39, 111 S.Ct. 328 (1990), in which the jury was instructed, inter alia:

> "Even where the evidence demonstrates a probability of guilt, if it does not establish

such guilt beyond a reasonable doubt, you must acquit the accused. . . . A reasonable doubt is not a mere possible doubt. It is an actual substantial doubt. It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a moral certainty." (498 U.S., 40; emphasis in original).

The Court in Cage continued as follows:

"In construing the instruction, we consider how reasonable jurors could have understood the charge as a whole. Francis v. Franklin, 471 U.S. 307, 316 (1985). The charge did at one point instruct that to convict, guilt must be found beyond a reasonable doubt; but it

then equated a reasonable doubt with a 'grave uncertainty' and an 'actual substantial doubt,' and stated that what was required was a 'moral certainty' that the defendant was guilty. It is plain to us that the words "substantial" and "grave", as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard. When those statements are then considered with the references to 'moral certainty,' rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process

Clause." (id., 41; emphasis added).

Clearly, the Supreme Court has concluded that instructions which distinguish between "moral certainty," on the one hand, and "evidentiary certainty" or "mathematical certainty," on the other hand, could be "interpreted . . . to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause." (id).

In the present case, the prosecutor began by stating that the reasonable doubt standard is "one of the most convoluted cases of legalese that most of us have probably ever seen." He then noted, "Unfortunately, that's the standard." (RT 531). [1] The prosecutor then asserted that reasonable doubt falls "in that range"

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[1] In this Petition, the letters "RT" shall refer to the Reporter's Transcript on Appeal. The letters "AOB" shall refer to the Appellant's Opening Brief on appeal, and the letters "ARB" shall refer to the Appellant's Reply Brief on Appeal.

between a hundred percent certainty and fifty percent certainty and stated, "[T]hat's a heck of a large range." (RT 531-532). When defense counsel objected, the court sustained the objection but without explanation. (RT 532). Undaunted, the prosecutor then explicitly distinguished between "scientific certainty" and "moral certainty" in his argument to the jury, asserting that the latter did not require the former. (RT 532-533). When defense counsel again objected, the trial judge simply agreed with the prosecutor's distinction, asserting, "Scientific certainty isn't one of the elements, but you can continue and I'll be giving you the instruction." (RT 533). The prosecutor then correctly noted, "Nor did I ever say it was one of the elements, your honor and counsel." (id).

A reasonable jury could easily have interpreted this exchange as a statement

from the court that proof beyond a reasonable doubt only requires a "moral certainty" in the minds of the jurors and does not require proof which rises to the level of scientific, i.e., evidentiary, or mathematical certainty. This was the same distinction that was found violative of Due Process Cage v. Louisiana--a violation that now commands automatic reversal under Sullivan v. Louisiana, supra.

The distinction drawn by the trial judge between scientific certainty and proof beyond a reasonable doubt appears on page 533 of the Reporter's Transcript. The prosecutor's final argument concluded one page later. (RT 534). The court's comment was thus fresh in the minds of the entire jury when instructions were delivered. At no time during the issuance of the standard instruction pertaining to reasonable doubt did the court retract its earlier statement that scientific certainty is not an element

of reasonable doubt. (RT 546, 550-551). But as was observed in Francis v. Franklin, supra, 471 U.S. 307, 105 S.Ct. 1965:

> "These general instructions as to the prosecution's burden and the defendant's presumption of innocence do not dissipate the error in the challenged portion of the instructions. . . . Language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity. A reviewing court has no way of knowing which of the two irreconcilable instructions the jurors applied in reaching their verdict." (id., 471 U.S., 319-322).

It should thus be irrelevant that the court's misstatement of the law took place

during the final lines of the prosecutor's rebuttal argument rather than during the formal instruction phase of the trial. To conclude otherwise would be to indulge in pure ritualism. The test is "how reasonable jurors could have understood the charge as a whole." (Cage v. Louisiana, supra, 498 U.S., 41). Reasonable jurors could have remembered the court's comment that scientific certainty "is not one of the elements" and could have interpreted this comment as a statement that such scientific certainty is not one of the elements of the reasonable doubt standard. Such an interpretation could easily have effected the jurors' understanding of the soon-to be-delivered formal reasonable doubt instruction itself. Indeed, such an interpretation would have been based upon nothing more than the court's own words! But it is that interpretation which was fatal to the conviction in Cage. That

interpretation tainted the reasonable doubt instructions, which were, in turn, powerless to dispel the taint flowing from the court's comments in support of the prosecutor's remarks. (Francis v. Franklin, supra). Under Sullivan, supra, the Cage error which was manifest at Petitioner's trial mandates automatic reversal. It is not subject to any kind of harmless error defense.

The Court of Appeal's discussion of this entire issue not only ignored Sullivan completely but also materially distorts the record. The Court wrote, "Here, there is no claim that the trial court mistakenly defined reasonable doubt; only that the prosecutor incorrectly explained the concept in his closing argument." (Appendix A, 34a). This is manifestly false, as the foregoing indicates. The point was raised from the outset that the trial court's "comment that scientific certainty is not one of the elements only reinforced the

prosecutor's attempt to distinguish between scientific and moral certainty." (AOB 64; see also ARB 25-26).

The Court of Appeal also seriously distorts the facts by asserting that in response to the prosecutor's remarks in this connection, "[d]efendant twice objected and each time the court admonished the jury." (Ap. A, 34a). The second time around, the trial judge actually reinforced the prosecutor's inaccurate distinction between scientific and moral certainty. Under the Court of Appeal's misstatement of facts, the issue of judicial sanctification of the prosecutor's unconstitutional definition simply disappears. This then leads the Court of Appeal to invoke the notion that prosecutorial misdefinition is not as serious as judicial misdefinition. (Ap. A, 35a-36a). Yet this entire theory should have absolutely no application to a situation characterized by blatant judicial

sanctification of blatant prosecutorial misconduct in misdefining the burden of proof. This is particularly true in light of Sullivan. The Court of Appeal wrote that the harmless error standard does not govern this situation because, according to People v. Clair, 2 Cal. 4th 629, 662-663 (1992), the United States Supreme Court "embraced 'the "reasonable likelihood" standard for reviewing ambiguous instructions under the United States Constitution,' which involves 'inquiring whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation of that document. [Citation.]' (Clair, supra, 2 Cal. 4th at p. 663.)" But Sullivan categorically rejected this standard as to instructions which misdefine the burden of proof in a criminal case and opted instead for a standard of automatic reversal.

The Court of Appeal then continued:

"The court [in Clair, supra] also

> noted that '[a]lthough the same standard is applicable for instructions by the court and comments by the prosecutor, it must be used with recognition of the differing nature and force of its two objects in the eyes of the jury. We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (Id., at p. 663, fn. 8). (Infra, 21a).

But this illustrates why the trial court's sanctification of the prosecutor's misconduct in this connection was so serious--and why the entire analysis of that misconduct is so drastically imperiled by the Court of Appeal's failure to acknowledge not only the impact but also even the very

existence of the trial judge's comment in ratifying the prosecutor's statements.

A grant of certiorari in the present case is all the more appropriate in light of this Court's recent decision to consider the question of whether California's standard reasonable doubt instruction itself violates the Cage rule. That issue is now before this Court in Sandoval v. California, Supreme Court # 92-9049; see People v. Sandoval, 4 Cal. 4th 155, 185-186 (1992), wherein the California Supreme Court expressly rejected a Cage challenge to this State's statutory reasonable doubt instruction, also given in the present case. (See Ap. A, 33a, fn 14).

2. A second reason for granting the Writ is that this case presents an important question arising under the Equal Protection Clause of the Fourteenth Amendment and the reach of this Court's prior decision in Eisenstadt v. Baird, 405 U.S. 438 (1972).

Does California Penal Code section 262(b), which provides that "there shall be no arrest or prosecution under this section [for spousal rape] unless the violation of this section is reported . . . within 90 days after the day of the violation[,]" contravene the Equal Protection Clause of the Fourteenth Amendment in view of the fact that, as interpreted by the Court of Appeal in this case, the 90 day reporting requirement is restricted to cases of vaginal as distinct from oral or anal forcible penetration of a spouse?

Neither the rape statute nor the spousal rape statute defines the term "sexual intercourse" by restricting it to vaginal intercourse. (Penal Code sections 261, 262). If forcible penetrations of other bodily orifices in addition to the vagina are included in the phrase "sexual intercourse", then Appellant's conviction would be subject to reversal. The jury was

not instructed that prosecution of Steffan Carroll would be barred unless his wife reported the alleged forcible oral copulation/sodomy incident within 90 days of its occurrence, and the prosecution never attempted to prove the fact of such a complaint within the reporting period. (Penal Code section 262). In upholding Petitioner's conviction, the Court of Appeal interpreted the term "sexual intercourse" as used in Penal Code section 262 as restricted to cases of vaginal penetration. (Ap. A, 48a-50a). As thus interpreted, the statutory scheme presents a clear Equal Protection problem. Appellant has already so argued and raised the issue before the trial court in a motion for new trial. (Appellant's Opening Brief, 75-75; Appellant's Reply Brief, 35; Ap. A 48a). The Court of Appeal rejected Appellant's Equal Protection challenge on its merits. (Ap. A, 50a).

Penal Code section 262(b) provides that "there shall be no arrest or prosecution . . . under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred, within 90 days after the day of the violation." There is no rational basis for the Legislature's restriction of this protection against fabricated charges of spousal sexual assault to husbands who forcibly penetrate their wives' vaginas rather than the other bodily cavities. But as interpreted by the Court of Appeal, the statute clearly has this effect, arbitrarily discriminating in favor of husbands accused of forcibly penetrating their wives' vaginas and against those who are accused of forcibly penetrating the other bodily cavities. It accords husbands in the first category a limitations benefit

that is not available to husbands in the second category. The obvious purpose of such a limitations requirement is to provide protection against fabricated accusations. But there is no rational basis for concluding that this purpose is more deserving of fulfillment in vaginal penetration cases than in others. The distinction in question is therefore arbitrary and Constitutionally offensive.

Can the distinction be defended on the ground that it arose out of the Legislature's attempt to criminalize spousal rape? (Ap. A, 50a).

First, forcible oral copulation became a crime <u>before</u> spousal rape. The requirement of force was added to the oral copulation statute, Penal Code section 288a, in 1975, whereas the spousal rape statute was enacted only in 1979. (See West's California Annotated Penal Code historical summary, section 288a).

Second, even a reversal of historical chronology would not have saved the statute. In Eisenstadt v. Baird, 405 U.S. 438, 92 S.Ct. 1029 (1972), this Court invalidated a state law predicating entitlement to purchase contraceptives upon marital status. The Court wrote:

> "The Equal Protection Clause [of the Fourteenth Amendment] . . . den[ies] to the States the power to legislate that different treatment be accorded to persons placed by the statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so

> that all persons similarly circumstanced shall be treated alike.' Royster Guano Co. v. Virginia, 253 U.S. 412, 415." (Eisenstadt v. Baird, supra, 447, quoting from Reed v. Reed, 404 U.S. 71, 75-76 [1971]).

Thus, differences in treatment accorded to persons by a statute must have "a fair and substantial relation to the object of the legislation" in question.

What statutory purpose is served by restricting the protections of the 90 day reporting requirement to husbands who forcibly penetrate their wives' vaginas as opposed to other bodily cavities? How does such a distinction, based entirely upon the location of the penetrated orifice, fairly and substantially relate to the obvious statutory purposes underlying Penal Code section 262, i.e., protecting wives from sexual assaults by their husbands and

protecting husbands from unfounded accusations that such assaults have been committed? Do husbands who forcibly penetrate their wives' vaginas and husbands who forcibly penetrate their wives' other cavities present "[e]vils . . . of different dimensions and proportions, requiring different remedies[?]" (Eisenstadt v. Baird, supra, 448, quoting from Williamson v. Lee Optical Co.. 348 U.S. 483, 489 [1955]). How could the legislature have reasonably concluded that they do, having decided before enacting the spousal rape statute to legalize adult consensual oral copulation and sodomy? (supra).

In other respects, the over all statutory scheme in California treats spousal rape and forcible oral copulation as equivalent. Thus, for instance, the qualified privilege protecting victim disclosures of sexual assaults to sexual assault counselors extends alike to cases

arising under section 262 and 288a. (Evidence Code Section 1035.4, 1036.2). But as the Supreme Court noted in Eisenstadt v. Baird, supra, "Even on the assumption that the fear of pregnancy operates as a deterrent to fornication, the Massachusetts statute is thus so riddled with exceptions that deterrence of premarital sex cannot reasonably be regarded as its aim." (id., 449).

There is another discriminatory effect to which Appellant has been subjected by the statutory scheme. A conviction under section 288a, forcible oral copulation, constitutes a registrable sex offense, but this is not true of a spousal rape conviction under section 262. (Penal Code section 290(a)). Here again, assuming that Penal Code 262 only applies to vaginal intercourse, the statutory scheme arbitrarily treats husbands who forcibly penetrate their wives' vaginas more

generously than it treats husbands who accomplish forcible penetration of other spousal orifices. Here again, the discriminatory effect created by the statutory scheme is arbitrary, unreasonable and without substantial justification--or, for that matter, any justification at all.

The foregoing Equal Protection analysis finds striking confirmation by analogy in People v. M.D., 595 N.E. 2d 702, 231 Ill. App. 2d 176 (1992). In that case, the Illinois Court of Appeal considered a statutory scheme which provided a marital exemption from prosecution but only for sexual offenses not involving penetration. Noting that the "State's primary contention in support of the marital exemption is that the legislature is not required to solve all of the evils associated with a particular problem in one fell swoop[,]" the Court of Appeal wrote:

"Here, there is no rational basis

> for a statutory scheme which protects an individual from acts of forcible sexual penetration committed by a spouse but does not protect the individual from other acts of forcible sexual exploitation by his or her spouse." (595 N.E. 2nd, 712).

By the same token, there is no rational basis for a statutory scheme which conditions the applicability of a reporting limitations period for spousal sexual assaults upon the location of the bodily cavity which was allegedly penetrated.

3. Finally, is the erroneous introduction of irrelevant evidence concerning a defendant's attitudes toward women, relationships with women, lifestyles, beliefs and social values properly reviewable under the harmless error standard

in light of Dawson v. Delaware, ___U.S.___, 112 S.Ct. 1093 (1982)? This Court has not yet decided the issue. In the present case, the Court of Appeal upheld the propriety of eliciting testimony, inter alia, that defendant believed that men ought dominate women in relationships. (Ap. A, 16a). This case presents the question of whether Dawson's provision of First Amendment Constitutional protection to racist beliefs applies to other belief systems as well.

Appellant was charged with having forcibly orally copulated and forcibly sodomized his wife, Marilyn Carroll. He was also charged with having falsely imprisoned her and having subjected her to a spousal battery on another occasion. The prosecution was allowed to introduce a vast collection of inflammatory evidence pertaining to Appellant's attitudes, lifestyles, beliefs and practices without any showing that such evidence was relevant

to the charges at hand or to any element of the prosecution's case, such as motive, for instance. This evidence included: evidence that Appellant located his wife in a magazine filled with pictures of Asian women, (RT 393), that he was "looking for Asian wives," (RT 393A), that he married Marilyn but lived with another woman named Preeya at the same time, (id), that during one year, he received a thousand letters from women in response to information he provided to the magazine in which he found Marilyn's picture, (RT 393D), that Appellant referred to Preeya as his wife, (RT 393B, 403), that Defendant sought three to seven wives or living partners, (393D), that he found women living in Asia more attractive than women living in the United States, (RT 393E-H), that he was seeking "commitment first, love later," (RT 397), that he was ready to marry on short notice, (id), that he had not told Marilyn about Preeya before

Marilyn came to the United States, (RT 398), that Appellant had gone through a religious marriage ceremony with Preeya in Thailand, (RT 402), that he intended to divorce Marilyn after two years and had mentioned to Preeya that he might marry her, (RT 404), and that he believed that "men ought to dominate women in a relationship", specifically in relation to monetary matters. (RT 346). The prosecution was also able to elicit testimony that Appellant wanted Marilyn and Preeya to clean and cook and that the household responsibilities were performed by the two women. (RT 409). Repeated objections to this lifestyle-related evidence were overruled. (RT 346, 357-358, 393 E-J, 397, 399-400, 408-409). The trial court characterized the information as "background", (394), and the prosecutor simply argued, "Defendant was engaged in a pattern of exploitation." (RT 395).

Appellant has argued that this evidence was irrelevant to any issue in the case and was simply designed to prejudice the jury. Appellant has relied upon Dawson v. Delaware, supra, in which the Supreme Court applied the harmless error analysis in reversing a judgment of death obtained through the presentation of evidence of defendant's membership in the Aryan Brotherhood. The Supreme Court concluded that introduction of this evidence, which was not relevant to any issue in the case, violated the defendant's First Amendment rights and reversed under the harmless error rule.

The Court of Appeal concluded that defendant's belief system is not entitled to First Amendment Protection. (Ap. A, 20a). But the Court cited no case in support of its rationale for this conclusion, to wit, that the "preferences and lifestyle choices expressed by defendant do not form a

coherent set of philosophical or political beliefs such that the First Amendment would prohibit their revelation in the context of this trial." (id). First, the Court misstates the impact of Dawson v. Delaware, 112 S.Ct. 1093 (1992), which does not establish a constitutional prohibition against the introduction of relevant evidence concerning beliefs and associations but which instead applies the harmless error standard to situations in which evidence of such First Amendment conduct is admitted despite its irrelevance to any issue in the case. Second, the Court of Appeal did not site any case which supports its novel restriction of First Amendment protection to beliefs which "form a coherent set of philosophical or political beliefs." Such a "coherency" limitation upon the range of First Amendment protection is simply without foundation in our law. Further, the clear thrust of the prosecutor's challenged

evidence and argument is that Defendant is a "male chauvinist." If "male chauvinism" is not constitutionally protected, why is racism constitutionally protected, as was demonstrated by Dawson v. Delaware, supra?

The point of the Court of Appeal's argument, of course, is to cancel the applicability of the harmless error standard to consideration of a lengthy series of evidentiary errors. As Dawson makes clear, the question is the relevance of evidence about defendant's beliefs and not the "coherence" of those beliefs, whatever is meant by the word "coherence."

This was not a case in which evidence of sexual practices was relevant to prove a modus operandi in order to identify the perpetrator of an uncharged offense as the perpetrator of the charged offense. (Cf. People v. Clark, 3 Cal. 4th 41, 123-131 [1992], cited by the Court of Appeal at 20a.) Nor is this case comparable to People

v. Nicolaus, 54 Cal. 3d 551, 577-578 (1991), in which evidence of the defendant's hostility to the victim's religion provided a motive in a murder case. (Cf. Ap. A, 20a). For in the present matter, the prosecutor never claimed that Defendant's beliefs and practices provided him with a motive to commit sexual assault upon his wife. The Court of Appeal's very reliance upon these two obviously distinguishable cases in its opinion (12a) highlights Appellant's entitlement to reversal.

The Court of Appeal's defense of the challenged evidence is that it was "appropriately admitted to show the unconventional living situation." (15a). But the Court does not explain how an "unconventional living situation" is relevant to any issue in this case--except to prejudice the defendant. (Dawson v. Delaware, supra).

The Court of Appeal states, "The

question that comes closest to implicating defendant's 'beliefs' is the prosecutor's query; "Don't you believe that men ought to be the dominant ones in any relationship? But this question also has some relevance to the alleged threats of deportation as well as his explanation of his slaps and use of physical force in the June incident as de minimis." (Ap. A, 15a) The line of reasoning suggested by the Court appears to be that if a defendant believes that men should dominate women in relationships, he probably threatens and beats them. This precisely illustrates the complete lack of relevance supporting any of these life-style and belief-related questions, in direct violation, incidentally, of the character evidence rule.

The Court of Appeal writes, "As to questions concerning his preference for Asian women or methods for finding partners, this information had some probative value on

defendant's intent in seeking and bringing to this country marital partners, as well as to threats of deportation." (16a). The gaps in logic here are multiple. Defendant was not on trial for "seeking and bringing to this country marital partners," the bigamy charge having been dismissed. Defendant was not accused of using threats to accomplish his alleged sexual assault, so defendant's comment about immigration law, which he acknowledged anyway as informational, (14a), was in any event irrelevant. [2]

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[2] The Court of Appeal ignored the futility exception to the contemporaneous objection requirement (People v. Pitts, 223 Cal. App. 3d 606, 693 (1990) by insisting upon an objection to each and every challenged question and by ignoring the sustained series of objections that was actually made without effect, first to evidentiary rulings and then to argument. (Ap. A, 14a-18a; AOB 34-37).

The Court of Appeal also theorized that "the context of the relationship shed light on [Marilyn's] delay in reporting the March incident." (15a) Marilyn testified that she was afraid of being deported. There was thus no need to explore what the Court of Appeal describes as "the context of the

In sum, challenged evidence concerning Petitioner's lifestyles, beliefs and attitudes toward women was simply not relevant on any theory advanced either by the prosecution or by the Court of Appeal. Here, as in Dawson v. Delaware, supra, irrelevant evidence of protected beliefs was introduced simply for its prejudicial effect. This implicates the First Amendment and the harmless error rule, as in Dawson, supra.

The present case thus presents questions directly relevant to the reach and application of this Court's holding in Dawson v. Delaware. Firstly, is Dawson limited to racist beliefs, or does it extend generally to other belief systems? Secondly, is Dawson limited to cases in which the defendant belongs to a certain organization or entertains what the Court of Appeal described, without further definition, as a "coherent set of

philosophical or political beliefs[?]"

## CONCLUSION

For the foregoing reasons, it is respectfully requested that the Petition for Writ of Certiorari be granted.

Respectfully Submitted,

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APPENDIX A

FILED

June 14, 1993

Court of Appeals, Fifth Appellate Dist.

BY _____

Deputy

NOT TO BE PUBLISHED

IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

STEFFAN E. CARROLL,

Defendant and Appellant.

No H009040
(Santa Clara County Super. Ct. No. 144496)

Defendant Steffan E. Carroll appeals from the judgment entered after a jury convicted him of several crimes against his wife. He claims numerous errors at trial.

We affirm the judgment.

STATEMENT OF PROCEDURE

In January 1991, defendant was charged with bigamy (Pen. Code, section 281), [1] forcible sodomy (section 286, subd. (c)), forcible oral copulation (section 288a), subd. (c)), false imprisonment (sections 236/237), and spousal battery (section 273.5, subd. (a).).

Defendant's demurrer and motion to dismiss were denied, but the bigamy charge was dismissed at the beginning of trial. [2]

On May 9, 1991, a jury convicted defendant of forcible oral copulation, false imprisonment and spousal battery. He was acquitted of forcible sodomy.

On August 28, 1991, defendant's motions for new trial and modification of

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] The remaining counts were renumbered 1 through 4.

verdict (filed by substituted counsel) were denied. The court sentenced defendant to state prison for sex years (forcible oral copulation), with concurrent terms of three years (spousal battery) and two years (false imprisonment. He now appeals.

STATEMENT OF FACTS

Viewed in accordance with the usual rules on appeal (People v. Barnes (1986) 42 Cal. 3d 284, 303), the record shows: In May of 1988, defendant [3] responded to a personal advertisement placed by Marilyn Ramos, a resident of the Philippines, in 'Cherry Blossoms,' a magazine through which women (primarily from Asian and Pacific countries) meet men. They corresponded for the next several months, although Marilyn's knowledge of English was limited, and her letters were written or translated by

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[3] Defendant was employed as an engineer.

'Auntie Gloria.' [4] In September 1988, defendant went to the Philippines, married Marilyn and gave her family a $2,000 dowry, most of which went to Auntie Gloria. Defendant soon returned to the United States and Marilyn followed in September 1989 when her visa application was granted. During the interim, the parties corresponded and defendant sent money to Marilyn in the Philippines. Several of Marilyn's letters expressed concern for her immigration status if the authorities learned she met her husband through an advertisement, so she urged him to write letters back to her saying they had met through friends.

When Marilyn arrived in the United States, she found two other women living with defendant in his home: Kimberly Hart (a roommate) and Preeya Carroll, whom

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[4] According to Marilyn, some things were misrepresented by Auntie Gloria; defendant challenged Marilyn's asserted lack of knowledge of English.

defendant said he had married Marilyn. Defendant did not tell Marilyn about Preeya before she arrived because he because he wanted her to see how she liked the situation. He referred to Preeya as his 'wife,' not his 'spouse,' which he considered a legal designation. Marilyn and Preeya slept with defendant during alternate weeks; they divided household tasks and paid him $100.00 or more a week for 'expenses.' Defendant called Marilyn his 'wife slave.' He said his goal was to have three wives, and threatened to send her back to the Philippines if she didn't want to work.

Marilyn was upset with the situation, but did not want to return to the Philippines. Her English skills were poor and she had no friends in this country. She also knew she had to remain married for two years to obtain permanent resident status. Marilyn disliked sharing her husband with Preeya and, on one or more occasions, waved

a knife at her. Apparently one time the police were called, and they sent Marilyn to spend the night in a hotel.

Defendant frequently attempted sodomy with Marilyn, but she resisted vigorously. One time, in the spring of 1990 (approximately March or April), he forcibly penetrated her anally with his penis. She testified that he pushed her down on the bed, held her down as she struggled and penetrated her rectum, with his penis. Under cross-examination, she was less than certain about actual penetration. [5] Defendant then turned her over, sat on her chest so she could not get up, and put his penis in her mouth and ejaculated. She was bleeding and crying; he said "Go ahead, call the police, and let's see who's going back to the Philippines." According to Marilyn, she did not consent to the acts, but at that

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[5] Her statement to the investigating police officer and at the preliminary hearing indicated no penetration.

time did not know they were crimes.

In addition to her job in a restaurant, defendant encouraged Marilyn to sign up with a telephone dating service. She said he alleged her to have boyfriends if they paid money. Through this service, she met Ken Hopf and went on a date with him on June 14, 1990. The next night, she also went out with Hopf. When she called defendant to tell him she was spending the night with Hopf, he became angry and told her that he would tie her to the bed and "fuck [her] up the ass" when she came back home, or would end their relationship.

When Marilyn returned home around noon the next day, Preeya Preeya Carroll and Kim Hart were there with defendant. After the two women left, defendant demanded an apology. When she refused, they argued. He pushed her down and began to forcibly remove her clothes. He slapped her several times, then grabbed her by the hair and dragged her

across the room to the stairs. Screaming, Marilyn clung to the banister, and defendant eventually abandoned his efforts to remove her. He ordered her to leave and threw her clothes in a box. Defendant left the apartment briefly. Eventually, she used the telephone to call the police.

The responding police officer saw no bruises on Marilyn's body when he interviewed her about 4 p.m. that day, but she testified her head hurt for three days. After that, she went to stay with Hopf. Her divorce from defendant became final prior to trial.

Trial

Defendant's successful pre-trial motions kept from the jury much of the evidence seized from his home, including literature and other items exhibiting defendant's interest in certain sexual practices, such as sado-masochism, other evidence of his membership in specific

organizations and documents reflecting interest in male/female dominance and submission. The trial court expressed concern that defendant not be tried for his philosophy or his unusual lifestyle. The prosecutor finally conceded the evidence did not meet the requirements of Evidence Code section 1101, subdivision (b).

In addition to Marilyn Ramos and defendant, other witnesses at trial included defendant's roommate Kimberly Hart and Police Officer McLaren, who investigated the crimes. The testimony of the responding police officer (Paulides) was introduced by stipulation.

The complaining witness Marilyn Ramos had difficulty with her English communication skills. She apparently had used an interpreter at the preliminary hearing, and frequently blamed the interpreter for inconsistent statements introduced from that proceeding. Her

responses at trial were sometimes confusing or unclear, and even contradictory.

In his trial testimony, defendant essentially admitted the acts of June 16, including the fact that he told Marilyn she would have to submit to anal sex or move out, that he was angry and planned to do something physical "with" her, and that he pushed, slapped and dragged her. He insisted he pulled her hair only because she was trying to bite him and that the slaps were "stage slaps." As toe the March incident, he said there was no anal penetration because of his insufficient erection, and that oral copulation was frequent and consensual. He testified that the partners' fights or struggles frequently led to love-making, so he didn't realize Marilyn was not consenting in June. He admitted he did not tell Marilyn about Preeya. He had gong through a religious ceremony with Preeya and intended to divorce

Marilyn after two years. He said that he told her about the immigration laws for her own information and not to threaten her with deportation.

DISCUSSION

I

Admission of Prejudicial Evidence

Defendant first contents that his right to a fair trial was "fatally impaired" by a series of erroneous evidentiary rulings. In essence, he complains that his First Amendment rights were violated by the prosecutor's cross-examination, which elicited testimony about his social beliefs and practices." The People respond that this information was relevant to attack his credibility and to impeach his testimony.

Defendant relies primarily on the case of Dawson v. Delaware, (1992) ___U.S.___ [112 S.Ct. 1093]. wherein the Supreme Court concluded that the First and Fourteenth Amendments prohibited the introduction in a

capital sentencing proceeding of the fact that the defendant was a member of an organization called the Aryan Brotherhood, where the evidence had no relevance to the crime or the issues being decided in the proceeding.

Before reaching the details of defendant's argument, we must consider the basic principles applicable to the admission of evidence. First, all relevant evidence is admissible, except as otherwise provided by statute. (Evid. Code section 351; People v. Green (1980) 27 Cal. 3d 1, 198.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action," including evidence relevant to the credibility of a witness. (Evid. Code, section 210.) Although some character evidence may be inadmissible when offered to prove specific conduct, relevant evidence offered to

support or attack the credibility of a witness is generally admissible subject to the provisions of Evidence Code section 352. (Evid. Code, section 1101, subd. (c); section 1100.) Moreover, "evidence Code section 352 permits the trial court 'to strike a careful balance between the probative value of the evidence and the danger of prejudice, confusion and undue time consumption.' [Citations.] The court's exercise of discretion in admitting or rejecting proffered evidence will not be disturbed on appeal unless there is a manifest abuse of that discretion resulting in a miscarriage of justice. [Citations.]" (People v. Milner, (1988) 45 Cal. 3d 227, 239.)

Defendant challenges numerous questions asked of defendant concerning his personal preferences in marital partners, his relationship to Marilyn and Preeya and his opinion about male-female relationships.

Some of these questions were objected to, but some were not. Accordingly, in the absence of a timely and specific objection on the appropriate ground, we deemed the point waived. (People v. Green, supra, 27 Cal. 3d at p. 22.)

We conclude the evidence now challenged was relevant to both main witnesses' credibility: defendant's credibility as to the two incidents involved as well as his overall veracity on the stand; Marilyn's credibility, which was attacked in cross-examination on both incidents and on details of the relationship. Defendant basically admitted the events of the June incident, but interpreted them as a domestic disagreement. He insisted the March incident was consensual with no anal penetration. He also maintained that he informed Marilyn about the immigration laws for her own benefit, not to threaten her. During her testimony, Marilyn was accused of

immigration fraud and tarnished with her inconsistent statements about the offense and her confused, sometimes contradictory testimony. Moreover, the concept of the relationship shed light on her delay in reporting the March incident.

Testimony elicited

The prosecutor questioned defendant about his behaviors, preferences and lifestyle choices. He now objects, as unduly prejudicial, to specific questions about his "marriage" to Preeya in addition to his marriage to Marilyn. Most of these questions were not objected to below. More importantly, the essential facts were testified to by Marilyn and were appropriately admitted to show the unconventional living situation. [6] Marilyn also testified to defendant's desire for

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[6] No objection was made to the question eliciting defendant's response that he intended to "terminate the civil marriage" with Marilyn after two years.

several wives. Defendant now attacks the prosecutor's question, over objection, as to how many wives or living partners he wanted to end up with. But he failed to object to a similar question a few minutes earlier concerning his desire to live with several women as his common law wives. As to questions concerning his preference for Asian women or methods for finding partners, this information had some probative value on defendant's intent in seeking and bringing to this country marital partners, as well as to threats of deportation. The question that comes closest to implicating defendant's "belief" is the prosecutor's query: "Don't you believe that men ought to be the dominant ones in any relationship?" [7] But this question also has some relevance to

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[7] Defendant also objected to the question of whether he was seeking commitment first, love later and an earlier question about his opinions asked of another witness. This question is more fully discussed in the next section on prosecutorial misconduct.

his alleged threats of deportation as well as his explanation of his slaps and use of physical force in the June incident as de minimis. . . .

Uncharged acts

Defendant also challenges the testimony concerning and admission into evidence of thumb cuffs and a riding crop, which he admitted using in a sexual interaction with Marilyn, This information was apparently part of a statement given by defendant to the police officer when he was arrested. The trial court initially excluded the evidence under Evidence Code section 1101, subdivision (b), after the prosecutor sought to admit it either as evidence supporting an amendment of dates concerning the false imprisonment charge or as a prior specific incident where his attempted sodomy was prevented by Marilyn's vigorous struggles. However, the court remarked that the evidence would be admissible if it later

became relevant. After defendant previously testified on direct examination that he had never had anal intercourse without Marilyn's consent and that he never tried to override her objections by force, defense counsel asked: "Was there ever a time when you had any sexual conduct with Marilyn that you did not think--did not believe that she was consenting to that conduct, whatever it was?" Defendant answered: "No." He then testified she consented to and initiated oral sex. On cross-examination, when defendant again denied non-consensual conduct, the prosecutor sought to admit the sexual devices and statement to the police officer. After a lengthy discussion of the various issues involved, the trial court ruled the items admissible. [8]

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[8] The prosecutor read from the police officer's statement: "'In March, he handcuffed the victim, Marilyn Carroll's hands, using his thumb cuffs. Forced her face down in the bed. He said he hit victim, Marilyn Campbell [sic], several times in the butt with the riding crop and

Defendant now argues that because Marilyn never testified that this incident was against her well, the items should not have been admitted to impeach his statement that he never forced her to have sexual contact. He claims this evidence was not probative of any issue, and only illustrated an unconventional sexual practice. We disagree. Although we have only the quoted excerpt of the police report before us, the trial court apparently reviewed the entire document. The reported incident does have some tendency to show previous nonconsensual sexual conduct, and thus is direct impeachment of defendant's denial and reflects on his veracity. (See People v. Harris, (1989) 47 Cal. 3d 1047, 1082.)

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then attempted anal intercourse with victim, Marilyn Carroll. . . Suspect Carroll said victim, Marilyn Carroll, began to struggle to the point where suspect Carroll could not make penetration. Suspect Carroll said he gave up and made rear entry, vaginal intercourse with victim Marilyn Carroll.'"

Prejudice suffered from such evidence is outweighed by its probative nature.

As to defendant's assertion that the questions and evidence concerned his beliefs and practices and thus were protected by the First Amendment, we disagree. The preferences and lifestyle choices expressed by defendant do not form a coherent set of philosophical or political beliefs such that the First Amendment would prohibit their revelation in the context of this trial. (See Barclay v. Florida, (1983), 463 U.S. 939 [evidence of defendant's desire to start a race war was relevant to the crimes charged for sentencing purposes].) Accordingly, we decline to review any errors under the beyond a reasonable doubt standard set forth in Chapman v. California (1967) 386 U.S. 18.

To the extent the challenged information had some probative value because of the specific circumstances and crimes at issue

here, any prejudice was outweighed.) See People v. Clark (1992) 3 Cal. 4th 41, 123-131 [evidence of violence and deviant sexual practices not unduly prejudicial where murders alleged had sexual component]; People v. Nicolaus (1991) 54 Cal. 3d 551, 577-578 [evidence of defendant's hostility toward religion admitted as relevant and probative even though prejudicial].) We find no manifest abuse of the trial court's discretion resulting in a miscarriage of justice. (Ibid,; Evid. Code section 353.)

II

Prosecutorial Misconduct

Next, defendant makes numerous claims of prosecutorial misconduct. We consider each separately.

Closing Argument

"An argument by the prosecution that appeals to the passion or prejudice of the jury is improper. [Citations.]" (People v. Pitts (1990) 223 Cal. App. 3d 606, 694;

People v. Haskett (1982) 30 Cal. 3d 841, 863.) However, "the initial question to be decided in all cases in which a defendant complains of prosecutorial misconduct for the first time on appeal is whether a timely objection and admonition would have cured the harm. If it would, the contention must be rejected [citation]; if it would not, the court must then and only then reach the issue whether on the whole record the harm resulted in a miscarriage of justice within the meaning of the Constitution. (People v. Green, supra, 27 Cal. 3d at p. 34.)

Defendant insists that the prosecutor's closing argument unfairly emphasized his beliefs, attitudes, and practices, especially through the prosecutor's theme that defendant engaged in a pattern of exploitation, both economically and sexually. [9] He also maintains that his

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[9] See next page for footnote.

"[DISTRICT ATTORNEY] . . . Now, this is an unusual case with very unusual facts,

but I think there's one common theme that runs throughout it, and that common theme is exploitation. . . . The defendant testified that marriage doesn't mean a whole lot to him; he wants up to seven wives. Okay. So what does he really want? He's looking for servants. He's looking for someone to be submissive to him. He's looking for someone he can control. . . .

[paragraph] We're talking about Marilyn and Preeya now. Controls them with the threat of deportation. But Marilyn and Preeya depended on the defendant for them to stay in this country. And with respect to Marilyn, whey else would a woman who's married consent to live in a threesome with her husband? She doesn't want to go back. She feels like she's stuck. So the defendant brings her here, never tells her that he's already got another woman living with him here. . . .He's earning money from them, once they start working, so they aren't praying on his resources, they're benefiting him. And they're benefiting him in another way, as he's sleeping with them on an alternating basis, for at least the first couple of months that they are here.

[Paragraph] So we've got economic exploitation concerning their pay and their work. We've got sexual exploitation and we've got psychological exploitation. He dominants [sic] them . . . Marilyn isn't as compliant as the defendant hoped. And she's especially not compliant in that one particular area where he has a specific interest, and that is she won't give him what he wanted in bed, sodomy. Marilyn testified the defendant tried to sodomize her on numerous occasions. Based on that, in the defendant's own statement of being interested in sodomy, we know he's got an interest in this area. We also know by his own admission, that when he gets angry, he gets horny."

lack of objection is excused because of the trial court's previous erroneous rulings. (People v. Pitts, supra, 223 Cal. App. 3d at p. 693.)

We have already determined that the evidence referred to by the prosecutor was properly admitted. If defendant believed the emphasis on exploitation was unfair, he should have objected at trial and requested a curative admonition. "[I]t is well settled that the prosecutor has broad discretion to state his or her views as to what the evidence shows and what inference may be drawn therefrom. [Citations.]" (People v. Kelly, (1990) 51 Cal. 3d 931, 967.) Both counsel in closing argument pointed out that defendant was not to be convicted because his lifestyle was objectionable.

Bad Faith Questions

Next, defendant asserts he was

prejudiced by the prosecutor's repeated bad faith questions accusing him of having multiple wives. He points first to the cross-examination of Kim Hart (his roommate), when counsel objected to the question: "And did he tell you he married Preeya before he brought her back?" After defense counsel's objection on relevance grounds and a conference at the bench with no reported ruling, the prosecutor went on to a different topic. Initially, we note that the most logical reading of the transcript at this point indicates the objection was sustained. In addition, counsel's failure to obtain a ruling on the record waives the point the point for appeal. (See People v. Hayes, (1990) 52 Cal. 3d 577, 619.) Defendant then points to several questions the prosecutor asked in cross-examining him about his desire for more than one wife--the same questions complained of above.

Only one of these questions was objected to. Defendant asserts that the initial objection he made to the question asked of Him Hart obviated the need for further objections because of the trial court's ruling. This is clearly incorrect. As noted above, the record contains no ruling on the objection and its seems to have been sustained. An objection to a similar question asked directly or defendant should have been raised when the question was first asked. (People v. Green, supra, 27 Cal. 3d at p. 22, fn. 8.)

After numerous questions of defendant relating to his desires for more than one wife, defense counsel objected on relevance and Evidence Code section 352 grounds, and a lengthy discussion was had on the record but outside the presence of the jury. Essentially, the trial court overruled the objections but urged the prosecutor to move on and not repeat the same questions.

Defendant assigns error to two later questions: "Isn't it true that you had been trying to get additional wives the whole time that you were staying there?" "Okay. During the whole time that Marilyn was living there with you at the Norwalk address, you were in the process of trying to solicit other wives, weren't you?" Defense counsel renewed his continuing objection to the first of these questions.

"The rule is well established that the prosecuting attorney may not interrogate witnesses solely 'for the purpose of getting before the jury the facts inferred therein, together with the insinuations and suggestions they inevitably contained, rather than for the answers which might by given.' [Citations.]" (People v. Wagner,1 (1975) 13 Cal. 3d 612, 619.) Defendant insists that these questions prejudicially influenced the jury to believe he committed bigamy, when that charge had been dismissed

prior to trial. [10]

Defendant might have argued more successfully that the questions were repetitions or had been asked and answered. Even were we to assume error in permitting these questions to be asked, we see no prejudice because we find no reasonable probability of a different outcome in the absence of the error. (People v. Green,

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[10] The parties now disagree as to the reason the bigamy charge was dismissed. Defendant claims the prosecutor knew (see next page for continuation of footnote) defendant was not guilty of having more than one legal marriage and thus dropped the charges. The People insist that the requisite documentary evidence of an official marriage registered in Thailand could not be obtained, and that is why the prosecutor dismissed the charges. The People also speculate that Preeya Carroll's testimony would not be available at trial. However, at the preliminary hearing she testified that she and defendant had a religious marriage in Thailand but never officially registered it and that she understood she would not legally be married to defendant until he divorced Marilyn. This dispute involves speculation, the parties' differing interpretations of "marriage" and is not directly relevant to our resolution of this issue.

supra, 27 Cal. 3d at p. 27.) Here, the general topic of more than one wife was introduced during the direct examination of Marilyn because it related to the unusual living situation she encountered when she arrived in this country as defendant's "wife." [11] Defendant himself admitted that he did not tell Marilyn of this situation before marriage, and that he considered both women his wives. We do not see how the further, although possibility repetitive, questions above multiple wives could have prejudiced defendant such that a different verdict was reasonably probable. [12]

Jury's Responsibility to Return a Guilty Verdict

After urging the jurors to evaluate the

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[11] Defense counsel's objection on the ground of relevance was overruled.

[12] We reject defendant's position that any misconduct here and in closing argument implicates the harmless beyond a reasonable doubt standard of Chapman v. California, supra, 386 U.S. 18.

truth of defendant's statement that he told Marilyn about deportation only for her information, not to control here, the prosecutor cited the jury instruction concerning a witness testifying falsely in one part of his testimony. The prosecutor then stated: 'And it also sheds light on the defendant's frame of mind and his attitude toward his trial. He's trying to continue his pattern of exploitation. First, it's Marilyn, then it's Preeya, not it's the system, and ultimately it's you. He's gotten away with it so far. He's trying to pull it off one last time. Don't let him do it." We do not read this portion of the closing argument as inappropriately urging the jury to return a guilty verdict and uphold its civic responsibility. Moreover, no objection was raised, and we consider it waived. (People v. Green, supra, 27 Cal. 3d at p. 23.)

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Mischaracterization of Burden of Proof

Defendant contends the prosecutor incorrectly defined "reasonable doubt" in his closing argument, thus undermining the reasonable doubt standard and mischaracterizing the burden of proof the state must meet. The People reply that the remarks were only a colloquial explanation of the concept of proof beyond a reasonable doubt, and that a misstatement of the law is only misconduct if done deliberately or in bad faith. (See People v. Bonin, (1988) 46 Cal. 3d 659, 702.)

In discussing the concept of reasonable doubt, the prosecutor remarked that the definition was an example of "convoluted legalese." He then explained that the range of certainty required varied from civil to criminal trials and noted that the instruction on reasonable doubt didn't require scientific certainty. The remarks and the defendant's objections are set forth

in full in the margin. [13]

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[13] "[DISTRICT ATTORNEY] . . . What most defense arguments boil down to really is that the People haven't proved their case because we haven't proved it beyond a reasonable doubt. That requires you to judge what does the reasonable doubt instruction really mean. It's one of the most convoluted cases of legalese that most of us have probably ever seen. Unfortunately, that's the standard. So I just want you to think about this a little bit. The People have to prove their case beyond a reasonable doubt, and that means that to a moral certainty. [Par] Well, what's beyond a reasonable doubt? We all know in a civil case you have to prove something just over fifty percent in order to prevail. We also know that beyond a reasonable doubt is not a hundred percent certainty, because that's impossible, and the judge will instruct you about that. So we just know its somewhere in that range and that's a heck of a large range. So what are we really talking about? [Par.] [DEFENSE COUNSEL]: I'm going to object to that characterization as a misstatement of the law. THE COURT: Sustained. [Par.] [DISTRICT ATTORNEY]: Here's how I want you to think about reasonable doubt. Here's absolute certainty up here, okay, that's not reasonable doubt. So what's the next level below that? Scientific certainty. What's scientific certainty? Well, there's certain things scientists can test, we can say within a certain percentage of error certain things are true, based on physical properties and that type of thing. Does the jury instruction say scientific certainty?

The state has the burden of proving a defendant guilty beyond a reasonable doubt. (section 1096.) The Penal Code defines reasonable doubt, [14] and instructs that the court may read to the jury the statutory definition 'and no further instruction. . . defining reasonable doubt need be given.'

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No, it doesn't. So we've gone from absolute certainty to scientific certainty. That's not it. What's the next level down? Moral certainty. What's moral certainty? It has to do with every day life, day to day affairs of people. This is why I asked you during jury selection, don't leave your common sense at home. What is---[Par] [DEFENSE COUNSEL]: Your honor, I'm going to object to the interjection of scientific certainty into the reasonable doubt instructions. Again, I'm convinced it misstates the law. [Par.] THE COURT: Scientific certainty isn't one of the elements, but you can continue and I'll be giving you the instruction."

[14] "Reasonable doubt is defined as follows: 'It is not a mere possible doubt; because everything relating to human affairs, and depending on moral evidence, is open to some possible or imaginary doubt. It is that state of the case, which, after the entire comparison and consideration of all the evidence, leaves the minds of jurors in that condition that they can not say they feel an abiding conviction, to a moral certainty, of the truth of the charge.'" (Section 1096.)

(section 1096a.) Error generally arises in the context of an incorrect instruction by the trial court. (See, e.g., People v. Garcia (1975) 54 Cal.App. 3d 61, 63-67; People v. Rubalcava (1988) 200 Cal. App 3d 1295, 299.) Here, there is no claim that the trial court mistakenly defined reasonable doubt; only that the prosecutor incorrectly explained the concept in his closing argument.

Certainly counsel have broad discretion in closing arguments to discuss the legal and factual merits of the case; however, 'it is improper to misstate the law. [Citation.]" (People v. Bell (1989) 49 Cal. 3d 502, 538.) Defendant twice objected and each time the court admonished the jury. We must assume the jury followed the trial court's instructions and admonitions. (People v. Frank, (1990) 51 Cal. 3d 718, 728.)

Defendant further asserts that the

prosecutor's erroneous explanation implicates a federal constitutional right and thus requires our review under the Chapman standard of determining whether the error was harmless beyond a reasonable doubt. (Chapman v. California, supra, 386 U.S. 18.) However, our Supreme Court recently discussed the appropriate standard of review for prosecutorial comments, in the context of Griffin error and "prosecutorial remarks generally." (People v. Clair (1992) 2 Cal. 4th 629, 662-663.) The Clair court noted that the United States Supreme Court embraced "the 'reasonable likelihood' standard for reviewing ambiguous instructions under the United States Constitution," which involves "inquiring whether there is a reasonable likelihood that the jury misconstrued or misapplied the words in violation of that document. [Citation.]" (Clair, supra, 2 Cal. 4th at p. 663.) The court also noted that '[a]lthough

the same standard is applicable for instructions by the court and comments by the prosecutor, it must be used with recognition of the differing nature and force of its two objects in the eyes of the jury. We presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade." (Id. at p. 663, fn. 8.)

Here, we see no reasonable likelihood that the jury misconstrued the instruction or misapplied the prosecutor's words. (People v. Clair, supra, 2 Cal. 4th at p. 663.)

Personal Belief in Guilt

"A prosecutor may not express a personal opinion as to guilt 'if there is a substantial danger that a juror will interpret it as being based on information not in evidence.' [Citation.]" (People v.

Frierson (1991) 53 Cal. 3d 730, 748.) On this ground, defendant attacks several statements in the prosecutor's rebuttal argument.

Initially, the prosecutor, after explaining the purpose of rebuttal, said: "Prosecutorial ethics prevent[] prosecutors from individually saying what we think the facts of the case are or what we personally believe of the defendant's guilt or innocence. What I'm telling you is what I believe the evidence shows. So, you aren't going to hear me say I this, I that. It isn't because I don't have those beliefs, it is I can't express them in this context." This was actually a response to comments by defense counsel in his closing argument concerning his beliefs about marriage, love relationships and including the statement: '[T]he fact is he's not guilty of each of those charges." We do not read the prosecutor's comments are expressing a

personal belief in defendant's guilt based on information outside the record. Moreover, defendant made no objection at the time and his later motion for mistrial based on this and other statements does not negate the deficiency. Nor was there any specific objection to the prosecutor's final statement: "The reason the People have to prove their case beyond a reasonable doubt is to protect the innocent, not set the guilty free."

Unlike cases relied on by defendant, here the prosecutor did not intimate a pre-trial personal belief or one based on other information. (See, for example, People v. Bain (1971) 5 Cal. 3d 839, 848 [district attorney expressly told jury he would not have prosecuted defendant unless he personally believed him guilty]; People v. Alverson, (1964) 60 Cal. 2d 803 [prosecutor asking for acquittal of one defendant based on his personal belief in innocence

reflected an improper implication of belief in co-defendant's guilt]; see also People v. Green, supra, 27 Cal. 3d at p. 35 [challenged remark did not mislead jury into believing prosecutor's request for verdict based on his own opinion and on evidence not introduced at trial].)

III

Sufficiency of the Evidence

"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. On appeal, we must review the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (People v. Jones (1990) 51 Cal. 3d 294, 314, citations omitted.) We review defendant's claims of insufficient evidence

with these principles in mind.

Forcible Oral Copulation

Defendant first claims that his acquittal on the companion charge of forcible sodomy demonstrates that there was insufficient evidence of the requisite force necessary for conviction of forcible oral copulation. We disagree.

First, the record does not reveal on what evidence (or lack of it) the jury based its decision to find defendant not guilty of the sodomy charge. However, our reading of the record shows that the jury could have based its decision on Marilyn's inconsistent testimony about actual penetration and defendant's testimony that sodomy was not possible because of erectile insufficiency. [15] And, in fact, this possibility is consistent with the jury's determination that defendant did commit oral copulation,

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[15] Defense counsel urged this approach in closing argument.

even though he did not commit sodomy.

Defendant is correct that the force required is force "substantially different from or substantially greater than that necessary" to accomplish the act itself. (People v. Bergschneider (1989) 211 Cal. App.3d 144, 153; see also People v. Quinones (1988) 202 Cal. App 3d 1154, 1158.) Here, Marilyn testified that defendant pushed her down on the bed, so she couldn't get up, sodomized here, then 'he turn me over and sat down on my chest and comes in my mouth . . . . . I still struggle, but I can't move." The police officer's report indicated Marilyn said defendant "forcibly" put her penis in her mouth. We conclude this is sufficient evidence for the jury to find forcible oral- copulation. "The testimony of a single witness is sufficient to uphold a judgment even if it is contradicted by other evidence, inconsistent or false as to other portions. [Citations.]"

(In re Frederick G., (1979) 96 Cal. App. 3d 353, 366.) Defendant's interpretation that his sitting on her chest was merely positional and that his entry into her mouth required her cooperation present factual questions appropriately determined by the jury. The jury was correctly instructed on the legal requirements of the offenses charged.

We are aware of our previous decisions in People v. Schulz (1992) 2 Cal.4th 999 and People v. Senior (1992) 3 Cal.4th 765 and their discussions of sufficient force in the child molestation context. In both cases, however, the defendants' convictions were upheld on the basis of duress. (Schulz, supra, 2 Cal. App.4th at p. 1005; Senior, supra, 3 Cal. App. 4th at p. 775-776.) Also, here, Marilyn testified to a struggle; the Senior court specifically noted there was no evidence of a struggle in that case. 3 Cal. App.4th at p. 774.)

False Imprisonment

Defendant was also convicted of felony false imprisonment: the "unlawful violation of the personal liberty of another," effected by "violence, menace, fraud, or deceit. . . ." (sections 236, 237.) He claims any restraint or force used was only incidental to the physical conflict between the parties. Recently, in People v. Hendrix (1992) 8 Cal. App. 4th 1458, 1462, the court explained: "Force is an element of both felony and misdemeanor false imprisonment. Misdemeanor false imprisonment becomes a felony only where the force used is greater than that reasonably necessary to effect the restraint. In such circumstances the force is defined as 'violence" with the false imprisonment effected by such violence a felony." Here, Marilyn testified that after she returned home on June 16, she refused to apologize to defendant even though he threatened to sodomize her. She said he

"suddenly hit me," "slapped me back and forth," "choke me and drag me . . . by my hair." She estimated that he dragged her 15 or 20 feet across the living room, to the bottom of the stairs, where she grabbed on to the banister and screamed. In fact, defendant admitted to forcibly trying to remove her clothes, slapping her, which he described as "stage slaps," and then dragging her by the hair, as he explained, to keep her from biting him. From this testimony, the jury could have concluded Marilyn was being restrained and forced to a location against her will with the use of force in excess of that needed to simply confine or move her. The parties' testimony that shortly thereafter defendant left Marilyn alone in the house briefly does not negate the preceding period of time during which she was confined against her will by violence.

/ / /

Spousal Battery

In order to prove the crime of spousal battery, the prosecution must prove: (1) that one spouse intentionally inflicted a bodily injury upon the other spouse, and (2) that such bodily injury resulted in a traumatic condition. See CALJIC No. 9.35.) "Traumatic condition" is defined as "a condition of the body, such as a wound or external or internal injury, whether or a minor or serious nature, caused by a physical force." (Section 273.5, subd. (c).) Marilyn testified that her head hurt for three days after defendant dragged her across the room by her hair. Defendant claims such injury is transient, insubstantial and only incidental to the battery.

But the statute specified that even a minor injury is the requisite traumatic condition. (Section 273.5, subd. (c).) This element of the statute was approved by

the court in People v. Gutierrez (1985) 171 Cal. App. 3d 944, 952.) The court explained that some other offenses require higher degrees of harm to be inflicted before the crime denounced by them is committed (felony battery or felony assault), but "the Legislature has clothed persons of the opposite sex in intimate relationships with greater protection by requiring less harm to be inflicted before the offense is committed. (Ibid.) [16] We think the prolonged "hurting" of Marilyn's head is sufficient injury as required by the statute.

Defendant insists that allowing such an insubstantial and incidental injury to qualify as a spousal battery will "felonize" all spousal batteries and thus will not

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[16] In Gutierrez, the husband pushed his wife, knocked her down, banged her head on the floor, grabbed her by the neck leaving a red mark, dragged her by the hair (causing her to lose quite a bit of hair) and through glass causing lacerations to her legs. (Id, a p. 947-948.)

deter the infliction of more serious injuries. (See People v. Daniels (1971) 71 Cal. 2d 1119, 11322-1133, discussing forcible kidnapping statute's element of bodily harm as requiring more than trivial injury.) We disagree. The Legislature obviously intended to punish more seriously even minor injuries inflicted by a spouse or partner.

Defendant further claims he was guilty only of a simple battery. (section 242.) But he specifically declined jury instructions on that offense, and cannot now claim reversible error. (People v. Duncan, 53 Cal. 3d 955, 969.) Substantial evidence supports his conviction for spousal battery.

IV

Time Bar

Defendant next contends his prosecution for forcible sodomy and forcible oral copulation was barred by the 90-day reporting requirement applicable to spousal

rapes under section 262, subdivision (b). That section prohibits arrest or prosecution for spousal rape unless the violation is reported to a peace officer or district attorney within 90 days after the day of the violation. [17] Defendant argues that the statute is broad enough to cover other sex acts, but he presents no authority for this position.

Section 262, subdivision (a) provides, in pertinent part: "rape of a person who is the spouse or a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear. . . . " In ascertaining legislative intent, we look to the language of the statute and "accord words their usual, ordinary and common sense meaning based on the language the Legislature used and the

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[17] There is no showing that defendant demurred to or otherwise raised this issue before trial. It first appears in his new trial motion. It is arguable that he has waived this claim.

evident purpose for which the statute was adopted. [Citations.]" (In re Rojas, (1979) 23 Cal. 3d 152, 155; People v. Catelli (1991) 227 Cal.App.3d 1434, 1448.) The statute specifically prohibits the act of sexual intercourse. We think a common sense interpretation of this statute prohibits the act of vaginal intercourse against the will of a spouse. The dictionary definition of sexual intercourse is coitus, in turn defined as the "physical union of male and female sexual organs. . . "(Am. Heritage Dictionary (2nd Col. ed. 1991), pp. 289, 1124.)

Section 262 was added by the Legislature in 1979, and is in direct contrast to the general rape statute (section 261), prohibiting sexual intercourse under specified conditions with "a person not the spouse of the perpetrator. . . ." No such distinction exists in the statutes prohibiting nonconsensual sodomy or

nonconsensual oral copulation. (See sections 286, 288a.)

Moreover, we note that defendant was not convicted of the sodomy charge. Even if his point were arguable concerning sodomy, stretching the statute to cover oral copulation is an even more difficult task.

Defendant was presented little analysis and no authority for his statement that these statutory distinctions violate his right to equal protection. In light of the original rape statute, which prohibited nonconsensual intercourse only with a person other than a spouse, we think the Legislature had a rational basis to criminalize and subject to a reporting requirement vaginal/penile intercourse, as the commonly acknowledged sexual interaction between marital partners.

Defendant's further complaint that the trial court erred in failing to give jury instructions based on his legal positions as

set forth above and in the previous section is without merit.

V

Ineffective Assistance of Counsel

"To show ineffective assistance of counsel, defendant has the burden of proving that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms, and that there is a reasonable probability that, but for counsel's unprofessional errors, the result would have been different. (Strickland v. Washington (1984) 466 U.S. 668, 687-688, 693-694 [parallel citation.) A mere failure to object to evidence or argument seldom establishes counsel's incompetence. (People v. Ghent, [1987] 43 Cal. 3d [739,] 772; see also [People v.] Frierson [1979] 25 Cal. 3d [142,] 158.)" (People v. Frierson, supra, 53 Cal. 3d at p. 747.) "If the defendant fails to establish the prejudice component of the

ineffectiveness claim, a reviewing court need not determine whether counsel's performance was deficient. [Citation.]" (People v. Hayes, supra, 52 Cal. 3d at p. 608.)

Defendant complains his counsel at trial was ineffective because (1) he failed to request a jury instruction based on certain immigration laws; and (2) he failed to call a specific witness.

Failure to request jury instruction

Defendant asserts trial counsel should have requested a jury instruction specifically setting forth the immigration statutes, which require a showing of spousal abuse or lack of fraudulent intent in order to except an alien with permanent resident status based on a marriage from the two year-marriage requirement to avoid deportation. (See 8 U.S.C. sections 1186a, subd. (c)(4)(C); 1251, subd. (a)(1)(G).) He reasons that Marilyn's fear of deportation

and desire to leave the marriage gave her a motive to fabricate charges against him. But this issue was explored on cross-examination, fully informing the jury of this possibility. And in fact, her credibility was challenged in numerous ways. Moreover, the parties were divorced at the time of trial. There is no showing that Marilyn Ramos was in violation of the immigration statutes or that she was being prosecuted by immigration authorities. We see no reasonable probability of a different result if in fact the precise language of the relevant immigration statute had been before the jury as an instruction. Careful consideration of the immigration statutes by the jury might have redounded to defendant's disadvantage, as his marital intentions might be judged fraudulent and thus in violation of the immigration statutes.

Failure to call Cary Snyder

According to Snyder's declaration and

testimony at the hearing on defendant's new trial motion, he offered to testify to a conversation with Marilyn shortly after the incident in which she said defendant had not hurt her and he observed no marks or bruises on her. Snyder and his Filipina wife knew defendant through a business relationship; his wife apparently disappeared because she did not want to testify at the trial. Defendant's trial counsel testified that he doubted Snyder's credibility, tried to find his wife to testify (the longer conversation with Marilyn had been mainly in Tagalog), and believed sufficient evidence was already before the jury showing no visible injuries (through the victim herself and the police officer). This could be considered a satisfactory explanation. (See People v. Sanders (1980) 221 Cal. App. 3d 350, 377.) More importantly, we do not believe admission of this testimony would have any reasonable probability of effecting a

different outcome.

VI

Sentencing Errors

Finally, defendant claims two sentencing errors; failure to state reasons and violation of section 654. In denying probation, the trial court noted that it would be denied "because of the nature and seriousness of this crime and the circumstances under this crime. Also, it's fairly obvious the defendant is ineligible for probation because of the nature of this crime."

Because of his section 288a, subdivision (c) conviction, defendant was statutorily ineligible for probation. (Section 1203.065 subd. (a).) Thus, a statement of reasons was not required for choosing a middle state prison sentence over probation. (People v. Langevin (1984) 155 Cal. App. 3d 520, 523; see also People v. Hawthorne (1991) 226 Cal. App. 3d 789, 793, fn. 5.)

As to the second alleged error, the Attorney General concedes that the acts of cohabitant battery and false imprisonment were part of an indivisible transaction with a common objective and thus one of the concurrent terms should be stayed under section 654. (People v. Williams (1984) 157 Cal. App. 3d 145, 157.) We remand for the limited purpose of staying the two-year concurrent term on count 3.

DISPOSITION

The trial court is directed to modify the judgment to reflect a stayed sentence on Count 3. As modified, the judgment is affirmed.

Wunderlich, J.

WE CONCUR:

Cottle, P.J.

Bamattre-Manoukian, J.

People v. Carroll
No. H009040

APPENDIX B

COURT OF APPEAL OF THE STATE OF CALIFORNIA

in and for the

SIXTH APPELLATE DISTRICT

FILED

July 6, 1993

Court of Appeal-- Sixth App. Dist.

By_____

Deputy

| | | |
|---|---|---|
| PEOPLE,<br>Plaintiff and Respondent, | ) | No. H009040 |
| vs. | ) | Superior Court No. 144496 |
| STEFFAN CARROLL,<br>Defendant and Appellant. | ) | |

BY THE COURT*

The Appellant's Petition for Rehearing is denied.

Jul-6 1993

COTTLE, P.J.

Before Cottle, P.J., Bamattre-Manoukian, J. and Wunderlich, J.

APPENDIX C

Sixth Appellate District No. H009040
S034079

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

IN BANK

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THE PEOPLE, Respondent,

v.

STEFFAN E. CARROLL, Appellant

SUPREME COURT
FILED
SEP 23 1993
ROBERT WANDRUFF CLERK

DEPUTY

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Appellant's petition for review DENIED.

LUCAS

Chief Justice

## APPENDIX D

FIRST AMENDMENT, UNITED STATE CONSTITUTION:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridge the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

FIFTH AMENDMENT, UNITED STATES CONSTITUTION:

No person shall . . . be deprived of life, liberty, or property, without due process of law;

FOURTEENTH AMENDMENT,
UNITED STATES CONSTITUTION

. . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection

of the laws. . . .

CALIFORNIA PENAL CODE SECTION 262

(in pertinent part as of time of trial)

"Section 262 Rape of Spouse

"(a) Rape of a person who is the spouse of a perpetrator is an act of sexual intercourse accomplished against the will of the spouse by means of force or fear of immediate and unlawful bodily injury on the spouse or another, or where the act is accomplished against the victim's will by threatening to retaliate in the future against the victim or any other person, and there is a reasonable possibility that the perpetrator will execute the threat. As used in this subdivision, "threatening to retaliate" means a threat to kidnap or falsely imprison, or to inflict extreme pain, serious bodily injury, or death.

"(b) The provisions of Section 800 shall apply to this section; however, there

shall be no arrest or prosecution under this section unless the violation of this section is reported to a peace officer having the power to arrest for a violation of this section or to the district attorney of the county in which the violation occurred, within 90 days after the day of the violation."